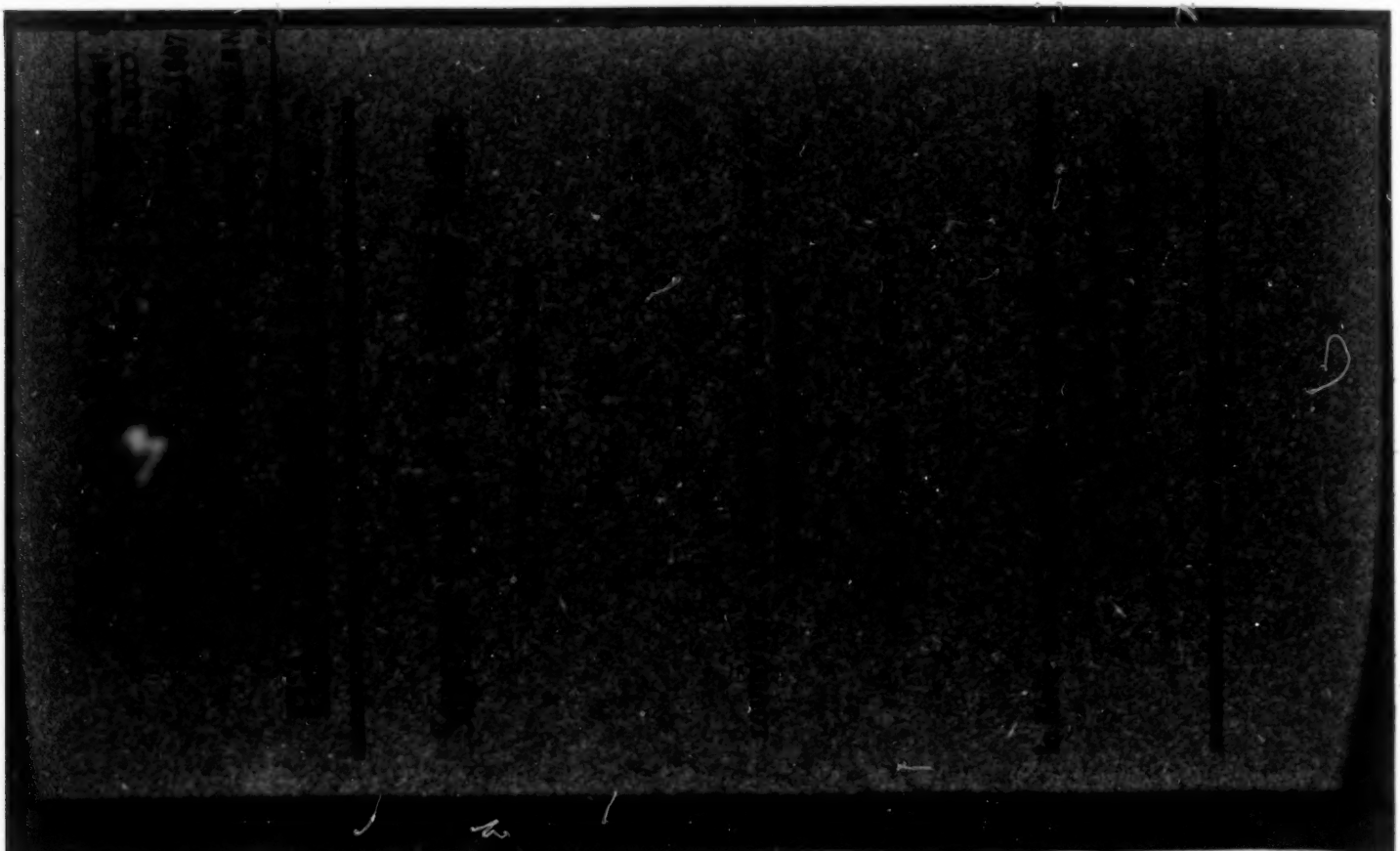

In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

SMITH, HUGGINS & COMPANY.

MOTION.

Comes the defendant in error, Smith-Huggins & Co., by its attorneys, and moves the Court to dismiss the writ of error in this cause, and for grounds submits the following:

1. There is no Federal question involved in the decision of this cause by the Supreme Court of Tennessee. There was drawn into question in said courts no statute of the United States; nor any authority exercised thereunder. Nor is the decision of the Tennessee Court in any way repugnant to the constitution, treaties, or laws of the United States. And there is no Federal question involved in said cause which would warrant this Court in reviewing the decisions of the Tennessee Court upon this writ of error.

2. The defendant in error moves to affirm the judgment of the Tennessee Courts, because it is apparent from the record printed and filed in this Court that the grounds alleged for writ of error are frivilous; and that the cause was brought to this Court for delay only.

Defendant in error files herewith its brief, and notice of motion, as required by the rules of this Court.

C. T. RANKIN,

Attorney for Smith, Huggins & Co.

In the Supreme Court of the United States,

October Term, 1906.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *in Error,*

vs.

SMITH, HUGGINS & COMPANY.

In Error to Supreme Court of Tennessee.

BRIEF FOR DEFENDANT IN ERROR, SMITH, HUGGINS & COMPANY.

The defendant in error comes and moves the Court to dismiss this writ of error and affirm the judgment, for the reason that no Federal question is involved; and the decision of the case by the Tennessee Courts contravenes no provision of the Constitution, nor any law of the United States. And because no such question was presented, or passed upon by the State Court.

I.

1. The plaintiff in error prints certain depositions, taken in its own behalf, omitting all opposing proof.

The attention of this Court is called to the fact that the Court of Chancery Appeals has made its finding of facts, which appears in the record.

Op. Court Chy. App., Rec. pp. 53-60.
Response to Pet. for Further Findings, Rec. pp. 75-77.

These findings are conclusive upon the Supreme Court of Tennessee as to the facts of the case; and that Court can not look behind the findings, to the depositions, or any matter of evidence.

Acts 1895, Ch. 76, Sec. 11, creating Court of Chancery Appeals (Shannon's Code, Secs. 6312-6327), provides:

"The findings of fact of said Court of Chancery Appeals shall, in all cases, be reduced to writing, and be conclusive; and the jurisdiction of the Supreme Court shall not extend thereto."

Code (Shan.) Sec. 6322.

Under this statute, the Supreme Court of Tennessee has repeatedly held that the case must be tried by it alone on the findings of the Court of Appeals. And that the decree of the Court of Appeals must be shown by the facts appearing in its findings to be erroneous.

Hale vs. Hale, 99 Tenn., 513.
Carver vs. Maxwell, 110 Tenn., 77.
Woodward vs. Bird, 105 Tenn., 673.

This finding of facts is equally conclusive upon this Court. It is well settled that on writ of error to a State Court, this Court will not review the findings of fact by the State Court.

K. & H. Bridge Co. vs. Illinois, 175 U. S., 626-635. (Law Ed. Book 44, p. 299.)
Jenkins vs. Neff, 186 U. S., 230-238. (Law Ed. Book 46, p. 1140.)

It would have been idle, therefore, for defendant in error to have directed the printing of the omitted depositions in order to show how well supported were the findings of the Tennessee Court by the entire record.

2. This Court will search the record in vain for any suggestion of a Federal question made in the State Courts. Neither the pleadings, decrees, nor findings of the State Courts contain any intimation that such question was suggested there.

It is suggested first in the petition for writ of error

from this Court (Rec. pp. 3-6) and the certificate of Chief Justice Beard thereon. (Rec. p. 9).

It has been repeatedly held by this Court that this is not a sufficient presentation of a Federal question to confer on this Court jurisdiction on writ of error to a State Court.

Hulbert vs. Chicago, 202 U. S., 275. (*Law Ed. Boow 50, p. 1026.*

Parmalee vs. Lawrence, 11 Wall, 36-39. (*Law Ed. Book 20, p. 49.*)

Felix vs. Schamweber, 125 U. S., 54-60. (*Law Ed. Book 31, p. 687.*)

Brown vs. Atwell, 92 U. S., 327-330. (*Law Ed. Book 23, p. 511.*)

Powell vs. Supervisors, 150 U. S., 433-442. (*Law Ed. Book 37, p. 1134.*)

Wabash Rd. Co. vs. Flannigan et al., 192 U. S., 29-38. (*Law Ed. Book 48, p. 328.*)

An examination of the opinion and findings of facts of the Court of Chancery Appeals (Rec. pp. 53-60, 75-77), and its decree (Rec. pp. 52-53), together with the decree of the Supreme Court, which is one of simple affirmance (Rec. p. 80) will show that those Courts did not consider or pass upon any Federal question whatever; and that the Interstate Commerce Act invoked has no application.

Indeed, the certificate of Chief Justice Beard (Rec. p. 9) affirmatively shows that the said Act of Congress did not, in the opinion of that Court, apply or control the shipments.

It is manifest from an examination of the findings and opinion of the Court of Appeals, and the decree of the Supreme Court, that the single question decided, and the ground upon which these Courts based their decision, was *that the Louisville & Nashville Railroad Co., having voluntarily engaged in the business of transferring cars*

from point to point within the city of Birmingham for hire, for whoever applied; and having equipped itself with a net work of spur tracks, and side tracks, extending to the various factories, elevators, and business houses of the city, for the express purpose of carrying on this transfer or switching business, and this work being a regular part of its business, it became, in regard to said transfer business, a common carrier, and could not discriminate in receiving cars offered it for transfer, nor refuse to receive them and move them to points upon its side and spur tracks.

(*Op. Court App. pp. 58-59.*)

It is disclosed by the opinion of the Court of Appeals (Rec. p. 59), that in the State Court the contention of the Louisville & Nashville Railroad Co. was that as to this transfer business, it was a private carrier, and had the right to discriminate in the handling of cars offered it; or to refuse them altogether. The Court of Chancery Appeals find, however, that defendant by its course of business had become a common carrier in transferring such freight, and was bound to move it as speedily as practicable and impartially.

It is found as a fact (Response to Pet. Further Findings, Rec. p. 76) that plaintiff in error declined to receive and deliver these cars to their destination on its spur and side tracks, because it deemed it to its advantage to use said tracks in and for its own special business. That it could have handled this corn and delivered it to its destination much sooner than it did, had it not preferred other business; and even with that business with the energetic appliance of all means and facilities at its command.

It is manifest under the simplest rules of law governing common carriers,

(*a*) That a railroad company may so engage in a

switching, or transfer business in and about a city, as to become a common carrier in respect thereto.

(*b*) That having voluntarily assumed that character, it will not be allowed to discriminate among its patrons, or refuse freight proper to be transferred, and which it is able to transfer.

(*c*) That it must, as such common carrier, receive and move the freight as rapidly as possible by the energetic appliance of the means and facilities at its command.

There is nothing in Section 3 of the Act of Congress, relied upon by plaintiff in error (Pet. Rec. pp. 4-5) which prevents a railroad company from voluntarily engaging in such business of switching, or transfer of freight, and becoming a common carrier in regard thereto.

This Court will look to the opinion and findings of the Court of Appeals for the facts of the case, and to determine whether a Federal question is involved.

The Act creating the Court of Appeals expressly provides that its finding of fact shall become part of the record in the State Supreme Court, and be conclusive upon the Supreme Court.

Code (Shannon), Sec. 6322.

And the decrees of the Court of Chancery Appeals (Rec. p. 52) and of the Supreme Court (Rec. p. 80) expressly show that the opinion and findings of fact were made part of the record.

It is well settled that this Court will look to the opinion and findings of the State Courts, in order to see the ground of decision; especially, where such opinions are made part of the record.

Jacks vs. Helena, 115 U. S., 288. (Law Ed. Book 29, p. 392).

Bank vs. State of Tenn., 163 U. S., 416-426. (Law Ed. Book 41, p. 211).

So, it is respectfully insisted that the writ of error should be dismissed, because no Federal question was involved in, or passed upon by the State Court.

II.

But if the decision of the State Court should be reviewed upon its merits, the case was rightly decided, and should be affirmed by this Court.

It is found by the Court of Chancery Appeals (Op. Rec., pp. 58-59) that the Louisville & Nashville Railroad Co. maintained side, spur, and terminal tracks, in the city of Birmingham reaching various warehouses, elevators, and industrial plants. That it was, and had been for many years, accustomed to receive and remove cars of freight reaching Birmingham, or offered to it by any one, consigned to any of such industries, or plants, for a charge. It had been accustomed to receive all such cars as were tendered it for this purpose.

Pet. Further Findings, Rec. p. 69.
Response, Rec. p. 76.

It was regularly engaged in this switching, or transfer business when the contract for sale and shipment of this corn was entered into. W. C. Davis & Co. bought the corn with this arrangement in view.

Op. Court Chy. App., Rec. p. 58.

This switching, or transferring of cars loaded with freight, or receiving and handling them from point to point upon its terminals within the city, alike for all who offered and paid its charges, was as much a part of its regular business as its general railroad business.

Op. Court Chy. Appeals, Rec. p. 58.

The cars of corn were perishable, and both the Southern and the Louisville & Nashville Railroads had notice

of the necessity for the prompt handling and unloading of them.

Op. Court Chy. Appeals, Rec. p. 58.

Notwithstanding this, the L. & N. Rd. Co. upon the arrival of these cars, refused to receive and place them at their destination upon the spur tracks and terminals, although constantly pressed to do so. It declared an embargo upon the receipt and handling of such cars, after the shipments in controversy were contracted and most of them made. (Op. Court App., Rec. pp. 58-59).

Its reason for refusing to receive and remove these cars to their destination, was because it deemed it to its advantage to use its said tracks for and in its own special business.

Response to Pet., Rec. p. 76.

It could have handled this corn and delivered it to its destination much sooner than it did, had it not preferred other business; and even with that business, with the energetic appliance of all the means and facilities at its command.

Response to Pet., Rec. p. 76.

As a result, the corn stood in the yards, and was so damaged as to become almost an utter loss. The Master and Chancellor concurred in a finding that 60 per cent. of the entire damages to the corn resulted from this refusal of the L. & N. Rd. Co. to receive and handle the cars. and the consequent standing in the yards.

Op. Court Chy. App., Rec. p. 57.
Response to ePt., Rec. p. 77.

This finding is expressly approved, and concurred in by the Court of Chancery Appeals. It was conclusive on the Supreme Court, being a question of fact.

In fact, the concurrent findings of the Master and Chancellor is conclusive on the Appellate Courts when

supported by any material evidence, even in the absence of the statute making the findings of the Court of Chancery Appeals conclusive.

Turley vs. Turley, 85 Tenn., 251.
Wilson vs. Bogle, 95 Tenn., 290.

It is manifest that the sole question considered by the State Courts, as to the Louisville & Nashville Railroad Co. was whether in this business of transferring cars of freight, to and fro upon its system of spur tracks, side tracks, and terminals to and from industries situated thereon, said Railroad Company was acting as a common carrier, or as a private carrier merely.

The Court held that by its method of conducting said transfer business, by doing such transfer or switching business for hire alike for all who desire it; and charging therefor a compensation; by holding itself out as ready to do such transfer work, and soliciting same, it became in respect to it a common carrier; and was, therefore, bound to receive and remove said cars as promptly as possible, and without preference.

This holding of the State Courts rests purely upon the facts shown in the case, and is conclusive as a determination of fact upon this Court.

No statute of the United States was considered. The section of the Interstate Commerce Act relied upon in defendant's petition (Rec. pp. 4 and 5) and assignments of error (Rec. pp. 6-8) is not involved.

III.

So far from requiring the defendant to give the use of its tracks, the terminal facilities to another carrier engaged in like business, it appears that the delivery of these cars by the Southern was complete, when it placed them upon its own delivery tracks in Birmingham. That after their arrival upon the Southern Railway Co.'s deliv-

ery tracks, these cars of corn were re-sold to various elevator companies, and mills upon the spurs and tracks of the Louisville & Nashville Rd. Co., and that the Southern Railway Co. in placing the cars upon the spur track of the Louisville & Nashville Rd. Co. was simply doing so as a matter of favor to the shippers; and without any warrant to charge that it was the shippers tendering the cars to be moved.

Pet. for Further Findings, Req. 1-2, Rec. pp. 60-61.
Req. 8, Rec. p. 62.
Response, Rec. p. 75.

The Southern Railway Co. was not demanding the use of the terminals of the Louisville & Nashville Rd. Co. It was ready and anxious to deliver the cars at all times after their arrival, upon its own sidings.

Pet. for Further Findings, Req. 12-13, Rec. p. 73.
Response, Rec. 75.

See also,
Rec. p. 68.

So, in the last analysis, the only question to be determined is, not a Federal question, but simply whether or not the Louisville & Nashville Rd. Co., as to its transfer business, so held itself out, and conducted the business as to become a common carrier.

LAW.

It can not be doubted that a—Railroad Company which by its character and charter is specially intended to engage in the business of a common carried, may so conduct a transfer business in and about a municipality, as to make itself a common carrier in respect to such business.

In the case at bar, the defendant maintained a sys-

tem of spur tracks and terminals in and around the city of Birmingham, upon which it was accustomed to transfer cars of freight, for all persons offering, without distinction. For these services, it received compensation.

Rec. pp. 58-59.

It held itself out as engaged in such transfer, or switching business, and solicited it by its course of business in respect thereto.

Op. Court of App., pp. 58-59.
Pet. Further Findings, Req. 32, Rec. p. 70.
Response, Rec. p. 76.

There is no possible reason why a Railroad Company may not voluntarily engage in such a transfer business in such a manner. And if it does, the law fixes upon it the character of a common carrier in regard thereto.

This Court has defined a common carries "as one who undertakes for hire, to transport the goods of those who may choose to employ him, from place to place."

Niagra vs. Cordees, 21 Howard, p. 7-35.

The Supreme Court of Tennessee, in the case of *Memphis News Publishing Co. vs. Southern Railway Co.*, 110 Tenn., 684, considers this very question of the distinction between common and private carriers. It is an instructive and well considered discussion of the subject. It is quoted in the opinion of the Court of Appeals in this case. (Rec. p. 59).

The case of *Peoria & Pekin Union Railway Co. vs. Chicago, Rock Island & Pacific Ry. Co.*, 109 Ill., 135, (S. C. 50 Am. Rep., 605, 18 Am. & Eng. Rd. Cases, 506) is a well considered case, and very nearly in point. In that case, the principal business of the defendant was switching cars, for other Railroad Companies, having their terminal points in the city of Peoria. It maintained a system of tracks in the city, reaching mills, elevators, and manu-

factories in and about the city. Other companies desiring to have cars switched by defendant, would place them on its transfer switch, and defendant would transfer them to the consignees, whose places of business were on its tracks. It was held that the defendant Railway Company became a common carrier as to the cars of freight so moved, and liable as such. The course of business of that company seems to have been very similar to the course of business of the Louisville & Nashville Rd. Co. in the case at bar.

Avinger vs. S. C. Ry. Co., 29 S. C., 265, (S. C. 13 Am. St. Rep., 716), is also a case, which well illustrates the principle contended for by complainant in the case at bar. In that case, a private line had been constructed by a Phosphate Company and the defendant railway, for the use of the Phosphate mills. It was held, that the question of whether or not the Railway Company, by its course of business, made itself a common carrier upon this branch line also, was a question of fact for the jury.

There can be no doubt, that the facts found by the Court of Appeals in this cause, makes the Louisville & Nashville Rd. Co. as to its transfer business, a common carrier.

The case at bar is essentially different from the cases of *Central Stock Yards vs. L. & N. Rd. Co.*, 192 U. S., 568, *K. & I. Bridge Co. vs. L. & N. Rd. Co.*, 37 Fed. Rep. —, p. 57, (S. C. 2, L. R. A. 289), and *G. & I. Ry. Co. vs. T. & N. O. Ry. Co.*, 93 Texas, 482 (S. C. 56, S. W. 328) relied upon by defendant.

The first of these, simply holds, that a railway maintaining a live stock depot, as a point of delivery for cattle moved over its lines, consigned to a certain municipality, can not be required to deliver, at a different point, where it may happen to have physical connection with another railroad.

The second case, involves the same question; and the

further question, whether the defendant Bridge Company was such a common carrier, as to require it under the provisions of the Interstate Commerce law, requiring interchange of freights, etc., to receive and interchange traffic with petitioner, at a point of physical connection at 7th Street and Magnolia Avenue in the city of Louisville. It was held that the charter of the Bridge Company did not confer upon it, power or authority to equip its road as a common carrier, or become such. And it was not required to interchange freight at that point.

The Texas case, considers the question, whether a Railway Company would, under the Texas statute, be compelled to receive from one railway, and switch to another, freight not routed, over any of its lines, and consigned to points not upon its lines.

As we understand these cases, they are not even remotely analagous to the questions involved in the case at bar. They are readily accessible to this Court, and are not, therefore, discussed at greater length.

Not one of them, nor any of the cases cited by the defendant, to which we have access, considers the question of a railroad company, which voluntarily engages in transfer and switching business in and about a city; constructing and maintaining a system or net work of spur tracks, side tracks, and terminal tracks for that purpose.. None of them undertake to decide, that the Railway Company engaging in and soliciting such transfer business for hire, and carrying alike for all persons for months and even years, would not, as to such business, become invested with the character of a common carrier, bound to receive and transfer freight over its lines, as speedily as the means at its command would permit, and without preference.

It may be a very intricate question, to what extent one railroad may be compelled against its will, to, receive and switch, or transfer freight for another. The decision of

such a question might depend largely upon local conditions and surrounding circumstances. If it were necessary to do so, complainant might, in this case, concede broadly the doctrine contended for by defendant, that a Railway Company could not be compelled to receive and switch cars over its own tracks, for the benefit of another Railway Company, without in any way impairing, the strength of its case. But such a question does not arise upon this record.

The question we have to consider in this cause is, whether a Railroad Company, by its charter, organized for the purpose of becoming a common carrier, and which has constructed its lines in and about the city of Birmingham, so as to reach the business houses, manufactories, mills, elevators, etc., for the undoubted purpose of engaging in a transfer and switching business for hire; and which has for years been engaged in such business, receiving and transferring freight for all alike, to and from such business houses, manufacturing plants, mills and elevators; and which holds itself out, as engaged in and soliciting such business, becomes in respect thereto, a common carrier. And if it thus becomes a common carrier, can it then refuse to receive and remove perishable freight, of the condition of which, it has notice, as soon as it could remove it, with the energetic use of the means at its command; and whether it has the right to discriminate among its patrons preferring the business of certain of them to the exclusion of others?

Upon these questions there can be no doubt but that the Tennessee Court reached the right conclusion. They are not Federal questions proper for the review of this Court. And it can not be doubted that upon the facts found in this case, this Court reviewing them, must arrive at the same conclusion as the Supreme Court of Tennessee.

If it even appeared, which we insist it does not, that

the business which the L. & N. Rd. Co. *as a common carrier engaged in, in the transfer business* about the city of Birmingham sought to prefer, were shipments which reached the city over the lines of the L. & N. Rd. Co. as a carrier of Interstate freight, or of freight received at other stations upon its lines, yet, we submit that in its transfer business it had no right to prefer it. The L. & N. Rd. Co. as a common carrier, in the transfer business about the city of Birmingham, must handle freight without distinction, as to the road over which it reached the city.

Respectfully submitted,

C. T. RANKIN,

Attorney for Smith, Huggins & Co.